

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

**FILED**  
UNITED STATES DISTRICT COURT  
DENVER, COLORADO

Civil Action No. 10-cv-01058-BNB

ROY J. MAIN,  
Applicant,

MAY 25 2010

GREGORY C. LANGHAM  
CLERK

v.

WARDEN PLUGH,  
Respondent.

---

ORDER TO FILE PRELIMINARY RESPONSE

---

As part of the preliminary consideration of the amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 filed on May 20, 2010, in this case and pursuant to *Keck v. Hartley*, 550 F. Supp. 2d 1272 (D. Colo. 2008), the Court has determined that a limited Preliminary Response is appropriate. Respondent is directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Preliminary Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies. If Respondent does not intend to raise either of these affirmative defenses, Respondent must notify the Court of that decision in the Preliminary Response. Respondent may not file a dispositive motion as a Preliminary Response, or an Answer, or otherwise address the merits of the claims in response to this Order.

In support of the Preliminary Response, Respondent should attach as exhibits all relevant portions of the state court record, including but not limited to copies of all documents demonstrating whether this action is filed in a timely manner and/or whether Applicant has exhausted state court remedies.

Applicant may reply to the Preliminary Response and provide any information that might be relevant to the one-year limitation period under 28 U.S.C. § 2244(d) and/or the exhaustion of state court remedies. Applicant also should include information relevant to equitable tolling, specifically as to whether he has pursued his claims diligently and whether some extraordinary circumstance prevented him from filing a timely 28 U.S.C. § 2241 action in this Court.

Finally, the court notes that Applicant names improper Respondents in the caption of the amended habeas corpus application filed on May 20, 2010. The law is well-established that the only proper respondent to a habeas corpus action is the applicant's custodian. **See** 28 U.S.C. § 2242; Rules 2(a) and 1(b), Rules Governing Section 2254 Cases in the United States District Courts; *Harris v. Champion*, 51 F.3d 901, 906 (10<sup>th</sup> Cir. 1995). Therefore, the only Respondent listed in the caption of this order is the Respondent identified as the warden of the facility in which Applicant is housed. Accordingly, it is

ORDERED that **within twenty-one (21) days from the date of this Order** Respondent shall file a Preliminary Response that complies with this Order. It is

FURTHER ORDERED that **within twenty-one (21) days of the filing of the Preliminary Response** Applicant may file a Reply, if he desires. It is

FURTHER ORDERED that if Respondent does not intend to raise either of the affirmative defenses of timeliness or exhaustion of state court remedies, Respondent must notify the Court of that decision in the Preliminary Response.

DATED May 25, 2010, at Denver, Colorado.

BY THE COURT:

s/ Boyd N. Boland  
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

**CERTIFICATE OF MAILING**

Civil Action No. 10-cv-01058-BNB.

Roy J. Main  
Prisoner No. 48337  
Colorado Territorial Corr. Facility  
P.O. Box 1010  
Cañon City, CO 81215-1010

Warden Plugh,  
c/o Keith Nordell  
Colorado Department of Corrections  
Office of Legal Affairs  
**DELIVERED ELECTRONICALLY**

John Suthers, Attorney General  
Office of the Attorney General  
**DELIVERED ELECTRONICALLY**

Paul Sanzo, Asst. Attorney General  
Office of the Attorney General  
**DELIVERED ELECTRONICALLY**  
**COURTESY COPY**

I hereby certify that I have mailed a copy of the ORDER to the above-named individuals, and the following forms to Keith Nordell for service of process on Warden Plugh; and to John Suthers: AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS FILED 5/20/10 on 5/25/10.

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk